rial that the extension was actually prejudicial, yet it is said that this added fact would discharge the surety. It seems, therefore, that the courts have really modified the strict defense of extension of time, as applied to surety companies.

When the creditor has security, as in the Missouri case, or a preferred claim against the principal, the surety's right of subrogation has real value, and may enable him to recover a larger amount from the principal than he could through his right of reimbursement. Here an interference with the right of subrogation by an extension of time, or by a surrender of the security,[14] does cause the surety potential injury. But even in such cases the expediency of absolving business sureties from their obligations, without proof of actual damage, is at least an arguable question.

It is important to point out that the distinction in these cases is not between corporate and individual sureties, — as is often loosely stated,[15] — but between persons, natural or artificial, who make a business of suretyship, and those who do not. And it is conceived that one who, not in the suretyship business, occasionally assumed the obligation for a small compensation, should fall within the latter class and be entitled to all the defenses which are available to sureties generally.[16] In this respect, the Missouri court seems to have gone too far in applying the stricter liability of professional sureties to stockholders who go surety on a corporation note. For, assuming that the stockholders received compensation indirectly through the benefit to the corporation,[17] they were not engaged in suretyship as a business.

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THE DACIA CASE. — The condemnation of this vessel by the French Prize Court involves an ancient problem of international law as to the validity of transfers of belligerent merchant ships to neutral ownership during hostilities, or in anticipation thereof. The Dacia was formerly owned by the Hamburg-American Line, a German company. After war broke out, the German owners offered the vessel for sale rather than that it should remain idle in an American port. It was accordingly bought in December, 1914, by a citizen and resident of the United States and transferred at once, under the Ship Registry Act of August 18, 1914,[1]

[14] Pearl *v.* Deacon, 3 Jur. N. S. 879; Kirkpatrick *v.* Howk, 80 Ill. 122. BRANDT, SURETYSHIP AND GUARANTY, § 480. Thus the surety is discharged although the creditor first learned of the suretyship relation after the contract with the surety was made. Guild *v.* Butler, 127 Mass. 386. And it is immaterial that the creditor first acquired the security after the surety became bound. Holland *v.* Johnson, 51 Ind. 346; Plankinton *v.* Gorman, 93 Wis. 560, 67 N. W. 1128.

[15] See, for instance, Young *v.* American Bonding Co., *supra*, 228 Pa. St. 373, 380, 77 Atl. 623, 626.

[16] In the principal Missouri case, even admitting that the sureties did receive consideration, yet they were not engaging in the business regularly for profit, with the risks and conditions neatly calculated, and therefore should have been allowed the ordinary technical defense.

[17] This does not seem to involve a disregard of the corporate fiction as has been suggested. 16 UNIV. OF MO. BULLETIN, No. 34, p. 47. Whether benefit moved to the stockholders by a loan to the corporation is purely a question of fact.

[1] 38 STATS. AT LARGE, pt. 1, p. 698.

to the American flag. Loaded with cotton consigned to Bremen, the ship started for the neutral port of Rotterdam, its first port of call. Under both British and French proclamations, cotton was not contraband at that time;[2] no question of contraband cargo was therefore involved. The vessel was seized as a lawful prize by a French warship acting under the rule of the Declaration of London.[3] Article 56 of that Declaration provides, in part, that "the transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed."[4] The Prize Court gave its judgment of condemnation on August 4, 1915. *The Dacia*, 42 Clunet 887. As usual in reports of French prize cases, the real *ratio decidendi* is difficult to find among the mass of concurrent grounds of decision, rather casually advanced. However, the court seems to base its decision on the fact that the seller's motive was to avoid the consequences of enemy ownership, which the Declaration of London forbids.

A complication is here introduced by the fact that the United States has declared itself not to be bound by the Declaration of London during the present war. On August 6, 1914, the United States inquired of each of the belligerents whether it would adopt the Declaration for use during the war.[5] Great Britain, France, and Russia thereupon replied that they would do so, with the exception, however, of some of the most important concessions to neutrals.[6] The United States then replied that it would not regard the Declaration as binding and that it would insist on its previous rights under international law.[7] This attitude of our government seems thoroughly justifiable, for the Declaration is not a mere codification of existing international law, but a compromise, the resultant of mutual and interdependent concessions. Consequently, the Declaration should stand or fall in its entirety.[8]

With the Declaration of London out of the way, the rights of the parties are left to international "common law."[9] There have, in general, been two contesting doctrines regarding the transfer of merchant vessels to neutral hands. The rule always strongly asserted and followed by the United States is that a sale by a belligerent to a neutral buyer is

[2] The French list of contraband in force at the time of the sailing and capture of the Dacia was that of Jan. 2, 1915. U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 21–22. The British list in force was that of Dec. 23, 1914. *Ibid.*, 15–16.

[3] Ambassador Herrick to the Secretary of State, Sept. 3, 1914; to be found in U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 7–8.

[4] BRIT. BLUE BOOK, MISC., No. 4 (1909), 59; WILSON & TUCKER, INTERNATIONAL LAW, appendix xii, p. 460. By the following article "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," subject to the provisions of art. 56.

[5] U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 5.

[6] *Ibid.*, 6–8.

[7] *Ibid.*, 8.

[8] This is recognized in art. 65 of the Declaration: "The provisions of the present Declaration must be treated as a whole, and cannot be separated." BRIT. BLUE BOOK, MISC., No. 4 (1909), 90.

[9] For general references to this subject see: HALL, INTERNATIONAL LAW, 5 ed., pp. 505–507; BONFILS, DROIT INTERNATIONAL PUBLIC, §§ 1344–1349 (1), inc.; 4 CALVO, LE DROIT INTERNATIONAL, §§ 2327–2338; 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., pp. 735–739.

valid if complete and without right of repurchase.[10] This rule has usually been followed by England also.[11] It is subject in both countries to numerous presumptions and exceptions.[12] On the other hand, the French rule, as text-writers have thought, is that no transfer during the war is valid as against the belligerent right of capture.[13] As early as 1704 a French edict had adopted this rule. It was followed by similar regulations in 1744 and 1778.[14] While this seems to be the French rule, the matter is not so clear as is commonly thought. In the case of *Le Haabet* v. *l'Heureux*[15] a transfer during hostilities was involved, and although counsel argued that the regulation of 1778 was conclusive, the court took pains to rest its decision on the fact that a complete *bonâ fide* sale had not been proved. The latter reason would be sufficient for condemnation even in an American court. It is also remarkable that in the Naval Instructions of 1870 the French Minister of Marine, in declaring substantially the American doctrine, seemed to ignore the existence of the decree of 1778.[16] Whatever the French rule may be, it is sufficient here to say that the United States has never recognized

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[10] See Fuller, C. J., in The Benito Estenger, 176 U. S. 568, 578, 580; Clifford, J., in United States *v.* Lilla, 26 Fed. Cas. No. 15600, at p. 945, 2 Cliff. 169 (1863). Also see Story's note in 2 Wheat. (U. S.), appendix 30.

[11] The Ariel, 11 Moore P. C. 119. See also Sir W. Scott in The Bernon, 1 C. Rob. 102. BRITISH MANUAL OF NAVAL PRIZE LAW (T. E. Holland, 1888), § 19.

[12] A belligerent public ship may not be transferred to a neutral during war, for instance. See The Minerva, 6 C. Rob. 396, 399 (Sir W. Scott); United States *v.* The Etta, 25 Fed. Cas. No. 15060; The Georgia, 7 Wall. (U. S.) 32, 7 MOORE, DIGEST OF INTERNATIONAL LAW, 415 (1868). There is at least a strong presumption against *bona fides*, when the transfer was in a blockaded port. The General Hamilton, 6 C. Rob. 61 (1805). There is an almost conclusive presumption against validity when the vessel is retained in the same trade as before. The Jemmy, 4 C. Rob. 31 (1801), by Sir W. Scott. Also, when the continued employment of the same master is stipulated for. The Omnibus, 6 C. Rob. 71 (1805). The transfer is absolutely invalid when there is a reservation of an interest. The Sechs Geschwistern, 4 C. Rob. 100. Or when made *in transitu*. See Vrow Margaretha, 1 C. Rob. 336 (cargo only involved). But liens are treated as immaterial. *Dictum* in The Ariel, 11 Moore P. C. 119, 135 (Privy Council, 1857). See also The Francis, 8 Cranch 418 (1814), holding the converse, that a neutral holder of a lien on an enemy vessel is not protected to the extent of his lien. See 28 HARV. L. REV. 217.

[13] BONFILS, DROIT INTERNATIONAL PUBLIC, § 1344; HALL, INTERNATIONAL LAW, 5 ed., p. 505; DE BOECK, PROPRIÉTÉ PRIVÉE ENNEMIE, pp. 172–176; 2 PISTOYE ET DUVERDY, PRISES MARITIMES, p. 3.

[14] CODE DES PRISES (Royal Press, 1784), 251, 412; 2 *ibid.*, 674. DE BOECK, PROPRIÉTÉ PRIVÉE ENNEMIE, p. 174. 2 PISTOYE ET DUVERDY, PRISES MARITIMES, pp. 1–3. HALL, INTERNATIONAL LAW, 5 ed., p. 505, n. BONFILS, DROIT INTERNATIONAL PUBLIC, § 1344.

[15] 1 PISTOYE ET DUVERDY, PRISES MARITIMES, 239 (1805). This is the only case of a sale during hostilities which is reported in PISTOYE ET DUVERDY. As to sales in anticipation of war, the edict of 1778 requires only that the sale be proved by certain papers executed before the outbreak of war and found on board the vessel. See also, DE BOECK, PROPRIÉTÉ PRIVÉE ENNEMIE, pp. 174–175; 4 CALVO, LE DROIT INTERNATIONAL, §§ 2328–2331.

[16] Article 7; to be found in DE BOECK, PROPRIÉTÉ PRIVÉE ENNEMIE, p. 175, n., and in BARBOUX, JURISPRUDENCE DES CONSEILS DE PRISES, p. 150: "When it appears from the examination of the ship's papers that since the declaration of war the nationality of a ship formerly an enemy one has been changed by a sale to neutrals, one must proceed with the greatest care to ascertain that the transfer has been executed in good faith and not for the sole purpose of simulating a neutral character for what is really still enemy property."

the right of condemnation where there has been a *bonâ fide* transfer to neutral ownership.[17]

If an appeal has not been seasonably taken, the only remaining possibility of relief is through diplomatic channels, the owners having lost all property in the *res*.[18] If the Department of State should see fit[19] to make a diplomatic claim in this case, based on the rule of law applied rather than on questions of fact, there is no reason why it should not do so. It is commonly said that unless a case has been appealed to the highest local courts, a state will not maintain a diplomatic claim.[20] This, however, is not literally true. The only objection to diplomatic claims before remedy has been sought in the highest courts is that the channels of diplomacy will be clogged by claims for decisions which might well have been corrected on appeal. The rule ends where its reason does. Where the objectionable court action depends on an administrative decree of the foreign government, as in this case, nothing could conceivably be gained by an appeal, and the aid of diplomacy may at once be invoked.[21]

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THE EFFECT OF A NATIONAL BANK'S PURCHASE OF STOCK IN A BUILDING CORPORATION. — A case of importance, involving the powers of national banks, has recently been decided by the Supreme Court of Tennessee. In *Fourth National Bank of Nashville* v. *Stahlman*, 178 S. W. 942, the bank bought shares of stock in a building corporation as part of a transaction in which it leased banking quarters in the building to be erected. The promoter of the corporation contracted to purchase from the bank at a later date the stock thus acquired by it, and deposited security for his performance. When suit was brought on his promise, he defended on the ground that the acts of the bank were *ultra vires* and the transaction void. Thus was presented a twofold problem: whether the transaction was *ultra vires*, and whether the authority of the bank was subject to collateral attack. The court held that the transaction was *intra vires*, and intimated that in any event the authority of the bank could not be questioned collaterally.

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[17] Mr. Marcy, Secretary of State, to Mr. Mason, Feb. 19, 1856; cited in 7 MOORE, DIGEST OF INTERNATIONAL LAW, pp. 416–417. Clunet speaks of a protest by the American government, August 5, 1915, the day after the condemnation of the Dacia was announced. 42 Clunet, p. 502.

[18] "The sentence of a foreign court *of competent jurisdiction*, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world." Dobree *v.* Napier, 2 Bing. (N. C.) 781, 795; Hughes *v.* Cornelius, Sir T. Raymond, 473. The sentence of a foreign court of admiralty binds the property on which it acts though that sentence is made under a decree subversive of the law of nations. This principle was applied to a condemnation under the Milan decree in the Napoleonic wars. Williams *v.* Armroyd, 7 Cranch 423 (1813). Other citations may be found in 7 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 1242–1243.

[19] The prosecution of such claims by the government is a matter of discretion, not of duty. See Gray *v.* United States, 21 Ct. Cl. 340, 392; 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 973, 974, 978, 995, 997.

[20] See 6 MOORE, DIGEST OF INTERNATIONAL LAW, § 987, citing numerous authorities.

[21] For a variety of cases showing that "a claimant is not required to exhaust justice where there is no justice to exhaust," — where an appeal would be futile, — see 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 988–992, incl.